

NO.

83-1988

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ALEXANDER L. STEVAS  
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IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 1983

GIOVANNI MASI, a/k/a "John Masi,"

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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Attorney for Petitioner

11/21/83



QUESTIONS PRESENTED FOR REVIEW

1. Whether the introduction of co-conspirator's out-of-court statements into evidence violated Defendant's right to confront, and cross-examine the witnesses against him?

2. Whether the District Court erred in providing the jury during their deliberations with typed transcripts of recorded communications in violation of the best evidence rule, the rule against improper emphasis and repetition, and the rule against hearsay?

3. Whether the District Court erred in denying Defendant's motion to arrest judgment under Count III since the court was without jurisdiction of the offense charged because the offense was not committed in its district?

4. Whether opening remarks by trial defense counsel regarding cocaine seized from the Defendant at the time of his arrest required a cautionary instruction by the District Court, sua sponte, in light of the government's decision to rest their case without presenting this evidence to the jury?

5. Whether the District Court erred in not granting Defendant's motion for a mistrial on account of prosecutor's comment upon Defendant's failure to testify before the jury?

6. Whether the District Court exceeded its authority when it imposed a particularly severe sentence against the Defendant?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings in the United States District Court were Raymond J. Dearie, United States Attorney for the Eastern District of New York, 225 Cadman Plaza East, Brooklyn, New York 11201, Respondent-Appellee herein; and GIOVANNI MASI, Petitioner-Appellant herein.

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October Term, 1983

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v.

UNITED STATES OF AMERICA,  
Respondent.

PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

Petitioner, GIOVANNI MASI, respectfully prays that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on April 6, 1984.

OPINION BELOW

The judgment of the United States District Court for the Eastern District of New York (Appendix A, *infra*, p. A1), was entered on August 23, 1983. The opinion of the United States Court of Appeals for the Second Circuit was filed on April 6, 1984. The opinion is reproduced as Appendix B, *infra*, p. A1.

JURISDICTION

The judgment of the Court below (Appendix B, *infra*, p. B1) was not reported. Rehearing was not sought. The jurisdiction of this Court is invoked under 28 U.S.C. Sect. 1254 (1).

STATUTORY PROVISIONS INVOLVED

Title 21 U.S.C. Sect. 841(a)(1) pertaining to controlled substances provides, as follows:

"(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally--

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or"

Title 21, U.S.C. Sect. 846 pertaining to controlled substances provides as follows:

" Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

#### STATEMENT OF THE CASE

The Defendant was charged by Second Superseding Indictment with violations of Federal Narcotics laws during the

period from December 1, 1982, to March 24, 1983. Named in the indictment were the Defendant and Co-defendant CINELLI only. Count I alleged conspiracy between the defendants during the period from December 1, 1982, to March 24, 1983, to violate Section 841(a)(1) of Title 21, United States Code, by distributing and possessing with intent to distribute substantial quantities of cocaine hydrochloride. Count II alleged that on December 1, 1982, the Defendants distributed a quantity of cocaine hydrochloride (one ounce). Count III alleged that on February 9, 1983, the Defendants possessed with intent to distribute within the Eastern District of New York and elsewhere, a quantity of cocaine hydrochloride (four ounces).

Meanwhile, CINELLI surrendered to Government authorities and was released

pending trial upon security.

The Defendant was apprehended on March 24, 1983, at his residence in Miami, Florida, upon Complaint filed in the Eastern District of New York alleging violation of Federal Narcotics laws. At the time of his apprehension, police authorities seized from Defendant's pants a small vial containing about one grain of cocaine hydrochloride.

After a bond hearing held at Miami, Florida, Defendant was transferred to New York. Bail was set at an amount which the Defendant could not afford.

Upon his first appearance in the Eastern District of New York, the Defendant was advised of his indictment. At a subsequent Bond hearing, the Defendant was advised that a superseding indictment had been returned. The Defendant stood mute to the indictment,

and the Court entered a plea of not guilty. At the time, the Defendant's counsel made several requests, including a motion to transfer the case to Florida. (Although not specifically said, this was a motion for change of venue.) A few weeks later, the Defendant retained the services of trial defense counsel, JOHN JACOBS, who pursued the Defendant's legal representation until prior to sentencing. A Second Superseding Indictment was returned shortly before trial.

CINELLI plead guilty to Count II with the understanding that he would not testify for the Government or the Defendant and was awaiting sentencing at the time of Defendant's trial. Defendant's conviction is based on testimony of Special Agent HAMILL, who had acted in an undercover capacity, out-of-court statements of co-Defendant CINELLI as reported by

HAMILL, and recorded telephone conversations.

At trial defense counsel's request, an evidenciary hearing was held to determine the admissibility of the evidence seized at the time of Defendant's apprehension. The Court ruled that the cocaine hydrochloride would be admitted into evidence. At trial, the Government rested its case without using any of the evidence seized at the time of defendant's apprehension.

However, during his opening remarks to the jury, trial defense counsel had made reference to the vial with cocaine found when the Defendant was arrested.

On December 1, 1982, CINELLI sold one ounce of cocaine hydrochloride to HAMILL. CINELLI and HAMILL had subsequent conversations for the sale of additional quantities of cocaine hydrochloride. During

the course of recorded telephone conversations between CINELLI and HAMILL, reference was made to "JOHN," who could provide quantities of cocaine. HAMILL and CINELLI continued their negotiations and, on February 7, 1983, HAMILL called the Defendant at his place of residence reportedly to negotiate the price of a quantity of cocaine. The Defendant hung up the telephone on HAMILL. Further, there was no specific reference to any drugs during their conversations. However, recorded conversations between CINELLI and HAMILL showed CINELLI's involvement with drugs and his partner "JOHN." The Government contended that CINELLI had entered into a conspiracy to distribute drugs with a person known as "JOHN," and that "JOHN" was Defendant MASI.

The Defendant never went to the

Eastern District of New York and there were no other recorded conversations between HAMILL and the Defendant. Further, no drugs were seized or secured other than the one ounce of cocaine which was sold by CINELLI.

The evidence at all times showed that the offense alleged under Count III was committed in Florida and not in New York.

During his rebuttal argument, the Government made specific reference to the Defendant's failure to testify regarding disputed telephone conversations where the Government claimed the Defendant had discussed the sale of narcotics in furtherance of the conspiracy charge.

Specifically, the Government argued:

" Mr. Jacobs said there were only four of the telephone conversations successfully recorded. We know four telephone conversations were successfully recorded. The defendant can explain that-Mr.

"Jacobs can't explain that way, ladies and gentlemen, because we all heard the conversations. Two of them were with the defendant sitting here. (Indicating.) And Agent Hamill identified Mr. Masi's voice on both of those telephone conversations." (emphasis added) (Trial Record Page 325 at 11-19).

Upon this improper argument of counsel, the Defense made a timely motion for mistrial, which was denied.

Once the jury's verdict was announced, trial defense counsel requested and the Court allowed for motions under Rule 29(c), Federal Rules of Criminal Procedure, to be made at the time of sentencing. On August 24, 1983, the Defendant was sentenced to ten years of imprisonment on each count of the Second Superseding Indictment to run concurrently in addition to a special parole term of ten years. A motion to arrest judgment under Count III was denied.

REASONS FOR GRANTING THE WRIT

## I.

THE CONVICTION ON COUNTS I AND II MUST  
BE REVERSED FOR THE REASON THAT IT IS  
BASED UPON IMPROPER EVIDENCE

The Defendant's conviction of Counts I and II is predicated upon the out-of-court statements of Co-Defendant CINELLI that there was a person named "JOHN" who was involved with him in the sale of drugs and the testimony of Special Agent HAMILL that this person "JOHN" was the Defendant.

Trial defense counsel objected to the use of the out-of-court recorded conversations and oral statements in evidence. The basis for his objection was that while the hearsay statements may in fact pass the test for admissibility under Rule 801(d)(2)(E), Federal Rules of Evidence, they were nonetheless inadmissible under the Sixth Amendment's

confrontation clause.

FIRST, before the out-of-court statements can be admitted into evidence, three requirements must be established. (A) there must be independent evidence establishing that the person against whom the statement is offered participated in the conspiracy. (B) the statement must have been in furtherance of the conspiracy. (C) the co-conspirator's statement must have been made during the life of the conspiracy. The first and second prerequisites were not met in this case. There was no evidence, "independent" or otherwise, of any other person being involved with CINELLI in the sale of December 1, 1982. We can assume that CINELLI obtained or otherwise secured the drugs from someone else, but not that there was a "conspiracy." Mere association with those who have conspired

cannot alone support a conviction for conspiracy. United States v. Torres, 519 F 2d 723 (2nd Cir.), cert. denied, 423 U.S. 1019 (1975). Further, it was not shown that the statements were in furtherance of the conspiracy. The "in furtherance" requirement has been given a broad interpretation; however, the sale of December 1, 1982, had already been consummated and it cannot be said that anything could be done "in furtherance" of it.

SECOND, the Sixth Amendment guarantees that "...the accused shall enjoy the right...to be confronted with the witnesses against him." The admission of out-of-court statements made by CINELLI had the effect of denying the Defendant his constitutional right to confront and cross-examine his accusers.

The confrontation clause issue and

the evidenciary question must be separately analyzed, and the Sixth Amendment may require the exclusion of evidence, even though admissible under Fed. R. Evid. 801 (d)(2)(E). United States v. Gibbs, 703 F. 2d 683 (3rd Cir. 1983); United States v. Perez, 658 F. 2d 654 (9th Cir. 1981); United States v. Palumbo, 639 F. 2d 123(3rd Cir.), cert. denied, 454 U.S. 819 (1981); United States v. Puco, 476 F. 2d 1099 (2d Cir.), cert. denied, 414 U.S. 844 (1973).

In Ohio v. Roberts, 448 U.S. 56 (1980), this Court identified two restrictions that the confrontation clause imposes on the use of hearsay evidence in criminal trials. First, the Government must show that the hearsay evidence is necessary because the declarant is unavailable. Second, the hearsay statement must be reliable.

CINELLI was called to testify at a hearing outside the presence of the jury. Upon inquiry by trial defense counsel, CINELLI invoked the Fifth Amendment privilege, which could render him legally "unavailable." Holt v. Wyrick, 649 F. 2d 543 (8th Cir. 1981), cert. denied, 454 U.S. 1143 (1982). However, the trial judge admonished CINELLI that he could not claim the privilege and commanded his testimony. It then became evident that CINELLI was refusing to testify in accordance with an agreement reached with the Government. The Government should not have been allowed to claim that CINELLI was unavailable when it caused his unavailability by misleading him about his plea agreement. Further, notwithstanding United States v. Lang, 589 F. 2d 92 (2nd Cir., 1978), the circumstances were particularly appropriate to

require the Government to grant immunity to CINELLI before offering the out-of-court statements or otherwise abate the prosecution.

To further compound the prejudicial effect of the out-of-court statements, the trial court allowed the jury to take into their deliberations typed transcripts of the recorded conversations. Trial defense counsel entered a timely objection. The use of these transcripts during jury deliberations violated the best evidence rule, the rule against improper emphasis and repetition, and the rule against hearsay.

The use of typed transcripts as visual aids to the jury in listening to the playback of recorded communications is a matter within the sound discretion of the trial judge. United States v. Carson, 464 F.2d 424 (2nd Cir.), cert.

denied, 409 U.S. 949 (1972); Fountain v. United States, 384 F.2d 624 (5th Cir.), cert. denied, Marshall v. United States, 390 U.S. 1005 (1968); United States v. Hall, 342 F.2d 849 (4th Cir.) cert. denied, 382 U.S. 812 (1965). However, there is apparent conflict amongst the Circuits regarding the jury's use of this evidence during their deliberations.

In United States v. John, 508 F.2d 1134, stay denied Lekometros v. United States, 420 U.S. 917, cert. denied Bernstein v. United States, 421 U.S. 962, and John v. United States, 421 U.S. 962, rehearing denied, 421 U.S. 962 (1974), the Court approved the use of these "visual aids," but with marked emphasis upon the fact that "...the transcripts were not made available to the jury during its deliberations," supra, at page 1141. On the other hand, United States

v. Koska, 443 F.2d 1167 (2nd Cir.), cert. denied, 404 U.S. 852 (1971), approved of the jury's use of transcripts during their deliberations.

With the advent of sophisticated electronic surveillance, it is imperative that the trial courts apply a uniform standard for the use of transcripts of recorded conversations.

## II.

THE CONVICTION ON COUNT III MUST BE  
REVERSED FOR THE REASON THAT THE  
DEFENDANT WAS DENIED HIS RIGHT TO TRIAL  
IN THE DISTRICT IN WHICH THE OFFENSE  
WAS COMMITTED

There is no dispute that the offense alleged under Count III occurred in Miami, Florida, instead of the Eastern District of New York, if at all. Notwithstanding the Court of Appeals below has determined that Defendant's objection to venue was waived because of the

failure to raise it appropriately in the trial court. The Court cites United States v. Menendez, 612 F.2d 51 (2nd Cir. 1979) for the apparent proposition that the Defendant waived the venue objection when he made his motion for acquittal without referring to venue.

When the Defendant was confronted with the superseding indictment, he requested transfer of his case for trial in Miami, Florida. Further, once the jury's verdict was announced, the trial court authorized the Defendant to make motion for judgment of acquittal at the time of sentencing, at which time Defendant's counsel moved to arrest judgment under Rule 34, Federal Rules of Criminal Procedure.

The decision denying Defendant's motion to arrest judgment was in error and the Court of Appeals below has

sanctioned such departure from the rules of law as to call for an exercise of this Court's power of supervision. The Court of Appeals below has overlooked the matters of record in this case.

### III.

TRIAL DEFENSE COUNSEL'S OPENING REMARKS  
ABOUT EVIDENCE NOT USED DURING TRIAL  
AND PROSECUTOR'S COMMENT UPON  
DEFENDANT'S FAILURE TO TESTIFY BEFORE  
THE JURY COUPLED WITH A PARTICULARLY  
SEVERE SENTENCE DEPRIVED THE DEFENDANT  
OF A FAIR TRIAL

The practice of trial defense attorneys of bringing out during opening remarks that evidence which is known to be prejudicial to the defendant and for which the Government has received a favorable ruling upon admissibility in order to take out the "sting" associated with disclosure of this prejudicial information to the jury is widely accepted. This practice is a legitimate trial

technique which has been given wide dissemination. Indeed, trial defense counsel should not risk defendant's conviction of serious criminal charges because of blemishes in the accused's record. Just because a person might have made one mistake, it does not mean that he is a serious criminal offender.

During opening remarks, trial defense counsel made specific reference to a grain of cocaine found in Defendant's pants. Without prior notice, the Government rested its case without presenting or making reference to this cocaine.

Absent Counsel's disclosure of Defendant's possession of cocaine, the jury was called to decide Defendant's case without any evidence of predisposition to drugs. There was no prior criminal record. Whether the Government

had the plan or design to induce trial defense counsel to comment upon evidence which had little probative value in this case and which they did not intend to present to the jury, or whether the Government inadvertently forgot to offer this evidence is unknown to us. However, the trial judge failed to safeguard the right of the accused to a fair trial by not advising the jury to disregard references made by trial defense counsel to matters which were not in evidence. We believe that the prejudicial effect was such that a cautionary instruction, sua sponte, was required in the charge to the jury.

Our inquiry into this matter has failed to show any legal authority for or against the proposition we now advance. However, we feel this is an important question of federal law which should be

settled by this Court.

To further compound the unfairness of these proceedings, the prosecutor challenged and pointed to the Defendant to explain the telephone conversations between the Defendant and others. These conversations were part of the core of the Government's case against the Defendant. Government counsel's statement is a matter of record.

Trial defense counsel made a timely objection and moved for a mistrial. However, both the trial court and Court of Appeals have dismissed this challenge as a "slip of the tongue" or "inadvertent" comment.

In United States v. Tierney, 424 F.2d 643, cert. denied, 400 U.S. 850, it was established that the test for whether there was comment on defendant's failure to testify is whether language used was

manifestly intended or was of such character that the jury would naturally and necessarily take it to be such comment. This is the situation in our case.

We cannot conceive of a more direct reference to the accused's failure to present evidence or to testify on the merits of the case than by asking the Defendant to "explain" and then almost simultaneously pointing or "indicating" at the person of the Defendant.

There may be cases in which there is intentional comment on Defendant's absolute right to remain silent, but those may be just four instances as suggested in United States Ex Rel Leak v. Follette, 418 F. 2d 1266, 1270 (2nd Cir., 1969). All others would be termed "inadvertent" as opposed to "intentional," thereby taking all the substance off the constitutional right of the accused.

This Court cannot allow this to happen.

The trial court should have admonished the Government in open court and conducted an individual inquiry of each and every member of the jury to determine their ability to disregard such prejudicial comments or grant a mistrial. The prejudicial effect of this violation of Defendant's constitutional right to remain silent and not have to "explain" anything to the jury cannot be corrected at this late stage of the proceedings, and therefore, he is entitled to reversal of his conviction on all counts of the Second Superseding Indictment.

Throughout trial, the trial judge made it evident to the Defendant that he was unhappy with him. The trial judge argued that he was playing games with the Court when he refused to waive provisions of the Speedy Trial Act. Further, the

trial judge stated that he wanted the Defendant to get a "full hearing" because he had in mind a "very substantial sentence" for him and he better know it.

We do realize that criminal sentences are not generally reviewable. Counts V. United States, 527 F.2d 542 (2nd Cir., 1975); McGee V. United States, 462 F. 2d 243 (2nd Cir. 1972). However, a court's failure to take appropriate steps to insure the fairness and accuracy of the sentencing process must be held to be plain error and an abuse of that discretion warranting review. United States v. Robin, 545 F. 2d 775, (2nd Cir., 1976).

The Court of Appeals below dismissed Defendant's contention about his sentence, arguing that it is "well within the statutory range." In so doing, the Court overlooked the body of law governing the sentencing process and the particular

contentions of this Defendant.

The conduct of Defendant's trial showed a departure of the proper judicial proceedings and the Court of Appeals below has sanctioned such departure so as to call for an exercise of this court's power of supervision by this Writ.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully Submitted,

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Attorney for Petitioner

**CERTIFICATE OF MAILING**

STATE OF FLORIDA )  
 ) SS.:  
COUNTY OF DADE )

On May 31, 1984, I served the within PETITION FOR A WRIT OF CERTIORARI on the interested parties in said action, by placing a true copy in each of two sealed envelopes, with First-class postage prepaid, in a United States post office at Miami, Florida, addressed as follows:

REX T. LEE  
Solicitor General  
of United States  
Department of  
Justice  
Washington,  
D.C. 20530

RAYMOND J. DEARIE  
United States  
Attorney for the  
Eastern District of  
New York  
225 Cadman Plaza  
East  
Brooklyn, NY 11201

I certify under penalty of perjury  
that the foregoing is true and correct.

EXECUTED on this 31st day of May,  
1984, at Miami, Florida.

LUIS E. RIVERA-MONTALVO



## **APPENDIX A**



United States of America vs.

GIOVANNI MAS1

United States District Court for  
the EASTERN DISTRICT OF NEW YORK

DOCKET NO. CR 83-00141(S-1)

**JUDGMENT AND PROBATION COMMITMENT ORDER**In the presence of the attorney for the government  
the defendant appeared in person on this dateMONTH DAY YEAR  
AUGUST 24, 1983☐ WITHOUT COUNSEL

However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel

☒ WITH COUNSEL

LITA FERNANDO RIVERA

(Name of Counsel)

☐ GUILTY, and the court being satisfied that  
there is a factual basis for the plea,☐ HOLD CONTENTEND☐ NOT GUILTY

There being a finding/verdict of

☐ NOT GUILTY. Defendant is discharged

TIME, A.M.

☒ GUILTY to counts 1, 2 & 3.

FILED

Defendant has been convicted as charged of the offense(s) of violating T.21 U.S.C. Sections 841(a) (1)  
846; T. 18 U.S.C. Section 2.The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary  
was shown, or appeared in the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is  
hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ten (10)years on count 1, ten (10) years and a Special Parole term of ten (10)  
years on count 2 and ten (10) years and a Special Parole term of ten (10)  
years on count 3. Said sentences to run concurrently.On motion of Assistant U.S. Attorney Peter J. Tomao, the underlying  
indictment and the first superseding indictment are dismissed as to  
the defendant Mas1.In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the  
reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and  
it may fine during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and  
revoke probation for a violation occurring during the probation period.

The court orders commitment to the custody of the Attorney General and recommends.

It is ordered that the Clerk deliver  
a certified copy of this judgment  
and commitment to the U.S. Mar-  
shal or other qualified officer.*Jacob Mas1*

August 24, 1983

the first of these is the fact that the  
the second is the fact that the  
the third is the fact that the

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the fourteenth is the fact that the  
the fifteenth is the fact that the

## **APPENDIX B**



B1

**United States Court of Appeals**

**For The**

**Second Circuit**

At a stated Term of the United States  
Court of Appeals for the Second Circuit,  
held at the United States Courthouse in  
the City of New York, on the  
6th day of April  
one thousand hundred and eighty-four.

**Present:**

HONORABLE WILFRED FEINBERG,  
Chief Judge

HONORABLE HENRY J. FRIENDLY,

HONORABLE JAMES L. OAKES,  
Circuit Judges

x

UNITED STATES OF AMERICA,

Appellee,

- v. -

83-1351

GIOVANNI MASI, a/k/a "John Masi,"

Appellant.

x

Appeal from the United States  
District Court for the Eastern District  
of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

**ON CONSIDERATION WHEREOF**, it is now hereby ordered, adjudged and decreed that the judgment of said district court is **AFFIRMED**.

1. Co-conspirator Cinelli's statements were admissible under Fed. R. Evid. 801(d)(2)(E), and admission of the statements did not deny Masi confrontation rights. There was ample evidence, independent of Cinelli's statements, that Masi participated in the cocaine distribution conspiracy. Moreover, Cinelli's statements, made in furtherance of the conspiracy, bore sufficient indicia of reliability and did not violate Masi's constitutional rights. See *United States v. Perez*, 702 F.2d 33, 37 (2d Cir.) (per curiam), cert. denied, 103 S.Ct. 2457 (1983).

2. The court did not abuse its discretion in providing the jury, during deliberations, with transcripts of recorded conversations especially when there was no claim that the transcripts were inaccurate and the court had cautioned the jury on the proper use of the transcripts. See *United States v. Koska*, 443 F.2d 1167, 1169 (2d Cir.), cert. denied, 404 U.S. 852 (1971).

3. Masi's contentions regarding chain of custody are, on this record,

with merit. Also without merit is his contention that the court was required, sua sponte, to give a cautionary instruction concerning defense counsel's reference in his opening statement to evidence which the government did not offer at trial.

4. There was no violation of Masi's speedy trial rights, since the period excluded due to the illness of trial counsel was properly excluded pursuant to the ends of justice provision of 18 U.S.C. Sect. 3161 (h)(8)(A). Also, Masi apparently claims before us that venue was improper. However, this claim was waived because of the failure to raise it appropriately in the trial court. See *United States v. Menendez*, 612 F. 2d 51, 55 (2d Cir. 1979). Masi's apparent contention that there was a material variance between the conspiracy period charged and the period proven at trial is similarly unavailing since Masi was given adequate notice in the indictment of the crimes alleged and the proof at trial fell within the period charged. See *United States v. Heimann*, 705 F.2d 662, 666 (2d Cir. 1983).

5. Masi argues that the prosecutor improperly commented on Masi's failure to testify. However, viewed in context, the comment appears to have been inadvertent and, in any event, was not "of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." *United States ex rel. Leak v. Follette*, 418 F.2d 1266, 1269 (2d Cir.

1969), cert. denied, 397 U.S. 1050 (1970). Contrary to Masi's assertion that the court erred in its instruction on flight, the charge was proper as given.

6. Masi's contention that he was arbitrarily denied trial by the jury of his choice is without merit. The claim that Masi's sentence was too severe is also unavailing, since it was well within the statutory range.

7. We have examined all of Masi's contentions and find them to be without merit.

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WILDFRED FEINBERG, Chief Judge

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HENRY J. FRIENDLY,

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JAMES L. OAKES,  
Circuit Judges.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

